**FOURTH AMENDMENT / EXCLUSIONARY RULE**
**Revised November 2017**

## Table of Contents

## I. FOURTH AMENDMENT – GENERAL

The Fourth Amendment provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Unlawful entry into a home is the chief evil against which the provision protects. It "applies to action by state officers under the Due Process Clause of the Fourteenth Amendment." *State v. Guillen*, 223 Ariz. 314, 316, ¶ 10 (2010), quoting *State v. Davolt,* 207 Ariz. 191, 202 ¶ 23 (2004) (citing *Mapp v. Ohio,* 367 U.S. 643, 655 (1961)). Arizona's constitutional counterpart to the Fourth Amendment, Ariz. Const. art. 2, § 8, provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Thus, as a general rule police must obtain a warrant before searching premises in which an individual has a reasonable expectation of privacy. *Guillen*, 223 Ariz. at 317, ¶ 10, citing: *Katz v. United States,* 389 U.S. 347, 356–57 (1967); *State v. Jones,* 185 Ariz. 471, 480 (1996).

### A. Reasonableness: Federal v. State Constitutions

The right to privacy protected by the Fourth Amendment and Ariz. Const. art. 2, § 8 is not a guarantee against *all* government searches and seizures, only *unreasonable* ones. *State v. Sisco*, 239 Ariz. 532, 538, ¶ 24 (2016), *cert. denied*, 137 S. Ct. 701 (2017) (emphasis in original). The ultimate touchstone of the Fourth Amendment is reasonableness. To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection." The limit is that "the mistakes must be those of reasonable men." *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014), quoting *Brinegar v. United States,* 338 U.S. 160, 176 (1949).

But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law; the officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or legal precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law. *Heien, supra*. "But the Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or of law—must be *objectively* reasonable." Courts do not examine the subjective understanding of the particular officer involved. *Heien*, 135 S. Ct. at 539. Accord, *State v. Moreno*, 236 Ariz. 347, 351-352, ¶¶ 7-9 (App. 2014)(officer made mistake of fact, not law, when he stopped defendant for suspected window-tint violation, but distinction between a mistake of law and fact may now have lost much of its significance in light of *Heien v. North Carolina*).

While “a State is free *as a matter of its own law* to impose greater restrictions on police activity than those [the United States Supreme Court] holds to be necessary upon federal constitutional standards,” it “may not impose such greater restrictions as a matter of *federal constitutional law* when [the Court] specifically refrains from imposing them. *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001), *quoting Oregon v. Haas*, 420 U.S. 714, 719 (1975) (emphasis in original). Whether or not a search is reasonable within the meaning of the Fourth Amendment has never depended on the law of the

particular state in which the search occurs; while individual states may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution, state law does not alter the content of the Fourth Amendment. *Virginia v. Moore*, 553 U.S. 164, 172 (2008). The Fourth Amendment's meaning does not change with local law enforcement practices; while those practices "vary from place to place and from time to time," Fourth Amendment protections are not "so variable" and cannot "be made to turn upon such trivialities." *Id.*, *quoting Whren v. United States*, 517 U.S. 806, 815 (1996). "A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional." *Moore*, 553 U.S. at 174. Thus, "warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections." *Id*. at 176.

While Arizona's constitutional provisions generally were intended to incorporate the federal protections, they are more explicit in preserving the sanctity of homes and in creating a right of privacy. Thus, as a matter of Arizona law, officers may not make a warrantless entry of a home in the absence of exigent circumstances or other necessity. Such entries are “per se unlawful” under the Arizona Constitution and violate the Arizona Constitution's guarantee of the right to privacy. *State v. Bolt*, 142 Ariz. 260, 264-65 (1984)(absent any showing of exigent circumstances or other necessity, officers violated Ariz. Const. art. 2, § 8 by entering defendant's residence without a warrant, inspecting and securing the premises, and detaining all occupants until a warrant could

be obtained); *see also State v. Ault*, 150 Ariz. 459, 463 (1986)(under Arizona law, officers may not make a warrantless entry into a home in the absence of exigent circumstances or other necessity).

But this protection only regards unlawful *warrantless* searches of homes; Arizona courts have not yet applied Article 2, § 8, to grant broader protections against search and seizure than those available under the federal constitution. The distinction between a warrantless home search and a search conducted pursuant to a valid warrant is constitutionally significant. Searches and seizures inside a home without a warrant are presumptively unreasonable; on the other hand, a homeowner has no right to prevent a law enforcement officer with a valid warrant from entering his home. Thus, the Supreme Court's determination that the knock-and-announce rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant, is wholly consistent with Arizona's constitution and appellate precedents. *State v. Roberson*, 223 Ariz. 580, 582–83, ¶¶ 13-14 (App. 2010) (violation of the knock-and-announce rule did not warrant suppression of evidence found in the house).

Ariz. Const. art. 2, § 8 has not been extended to provide greater protections to the warrantless search of a probationer's residence. *State v. Adair*, 241 Ariz. 58, ¶ 24 (2016)(warrantless search of a probationer's residence pursuant to a valid probation condition is not "without authority of law" and thus does not violate the Arizona constitutional privacy clause, as long as the search is reasonable under the totality of circumstances). Nor has it been extended to a person's automobile. *State v. Allen*, 216 Ariz. 320, 327, ¶ 28 (App. 2007)(lifting car cover was not a "search" under the Fourth

Amendment or, if it was a search, it was not an “unreasonable” search; the lifting of the car cover likewise did not violate any privacy rights under Ariz. Const. art. 2, § 8).

Further, under the Fourth Amendment, a warrantless breath test is allowed as a search incident to a lawful DUI arrest. With respect to the analogous article 2, § 8 of the Arizona Constitution, ASC court has long recognized that a search incident to a lawful arrest does not require any warrant, and that non-invasive breath tests for DUI arrestees fall within this exception. Requiring a DUI arrestee to exhale into a testing device is a slight inconvenience that represents a burden which such defendant must bear for the common interest. Thus, the Arizona Constitution does not provide greater privacy protection than the Federal Constitution with regard to DUI breath testing. *State v. Navarro*, 241 Ariz. 19, ¶¶ 4-5 (App. 2016) (distinguishing *State v. Valenzuela (Valenzuela II)*, 239 Ariz. 299 (2016) because that case concerned a blood test).

## II. EXCLUSIONARY RULE

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Amendment says nothing about suppressing evidence obtained in violation of this command. The exclusionary rule is a prudential doctrine, created to compel respect for the constitutional guaranty. Exclusion is not a personal constitutional right, nor is it designed to redress the injury occasioned by an unconstitutional search; the rule's sole purpose is to deter future Fourth Amendment violations. Thus, the rule's operation is limited to situations in which this purpose is thought most efficaciously served. Where suppression fails to yield appreciable deterrence, exclusion is clearly unwarranted. *Davis v. United States*, 564 U.S. 229, 236-37 (2011).

The exclusionary rule is, in essence, judge-made law designed to vindicate the constitutional right to privacy as embodied in the Fourth Amendment and in article 2 § 8 of the Arizona Constitution. Under the rule, the court must exclude from a criminal trial any evidence obtained in violation of the Fourth Amendment and article 2, § 8, unless the good-faith exception to the exclusionary rule applies. *State v. Navarro*, 241 Ariz. 19, ¶ 6 (App. 2016). The exclusionary rule as it exists today in Arizona remains solely a federal exclusionary rule. *State v. Juarez*, 203 Ariz. 441, 447, ¶ 22 (App. 2002)(although Arizona's constitutional privacy provision is similar to Washington's, the Washington Supreme Court required exclusion of illegally seized evidence in its state courts long before SCOTUS applied the exclusionary rule to the states through the Fourteenth Amendment in *Mapp v. Ohio*; the ASC has not); *see also State v. Hummons*, 227 Ariz. 78, 82, ¶ 16 (2011)(exclusionary rule is applied no more broadly under state constitution than it is under the federal constitution outside the home-search context); *State v. Guillen*, 223 Ariz. 314, 317 ¶ 13 n.1 (2010)(for purposes of the Arizona Constitution, "the exclusionary rule to be applied as a matter of state law is no broader than the federal rule").

**A. Good Faith Exception**

In a line of cases beginning with *United States v. Leon,* 468 U.S. 897, 909, 911 (1984), the cost-benefit analysis in exclusion cases was recalibrated to focus the inquiry on the flagrancy of the police misconduct at issue. The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue. When the police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights, the deterrent value of exclusion is

strong and tends to outweigh the resulting costs. But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, deterrence rationale loses much of its force and exclusion cannot "pay its way." *Davis v. United States*, 564 U.S. 229, 238 (2011)(exclusionary rule does not apply when police conduct a search in objectively reasonable reliance on binding appellate precedent), citing: *United States v. Leon,* 468 U.S. 897, 922 (1984)(exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on a warrant later held invalid); *Massachusetts v. Sheppard,* 468 U.S. 981, 990 (1984)(companion case declining to apply exclusionary rule where warrant held invalid as a result of judge's clerical error); *Illinois v. Krull,* 480 U.S. 340, 349-50 (1987)(extending good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes); *Arizona v. Evans*, 514 U.S. 1, 14 (1995)(applying good-faith exception where police reasonably relied on erroneous information concerning an arrest warrant in a database maintained by judicial employees); *Herring v. United States,* 555 U.S. 135, 137 (2009)(extending *Evans* where *police* employees erred in maintaining records in a warrant).

Likewise, in Arizona, the court must exclude any evidence obtained in violation of the Fourth Amendment and Ariz. Const. art. 2, § 8, unless the good-faith exception to the exclusionary rule applies. *State v. Peoples*, 240 Ariz. 244, 247-248, ¶ 9 (2016). It is poor judicial policy for rules governing the suppression of evidence to differ depending upon whether the defendant is arrested by federal or state officers. Therefore, for purposes of the Arizona Constitution, "the exclusionary rule to be applied as a matter of state law is no broader than the federal rule." *State v. Bolt*, 142 Ariz. 260, 269 (1984);

accord *State v. Guillen*, 223 Ariz. 314, 317 ¶ 13 n.1, (2010); *see also State v. Hummons*, 227 Ariz. 78, 82, ¶ 16 (2011)(exclusionary rule is applied no more broadly under state constitution than it is under the federal constitution outside the home-search context).

Thus, in Arizona, when police act with an objectively reasonable good-faith belief that their conduct is lawful, deterrence is unnecessary and the exclusionary rule does not apply. *State v. Peoples*, 240 Ariz. 244, 250, ¶ 26 (2016)(good faith exception did not apply to warrantless search of cell phone because officer lacked good-faith belief it belonged to victim, and knew or should have known that defendant was an overnight guest); *see also State v. Valenzuela*, 239 Ariz. 299, 309, ¶ 31 (2016)(good faith exception applied where officer followed binding precedent sanctioning use of implied consent admonition later held to violate Fourth Amendment); *State v. Weakland*, 2017 WL 5712585, ¶ 24 (App. Nov. 28, 2017) (clarifying that it was not until *Valenzuela II* was decided that law enforcement had a clear directive that they could not continue to use the admonition to imply they had authority to compel a warrantless blood draw; therefore, the good faith exception may apply in admin per se cases occurring before *Valenzuela II* was decided); *State v. Havatone*, 241 Ariz. 506, ¶¶ 22-34 (2017)(where departmental practice pertaining to blood draw was not objectively reasonable under Arizona law at the time of seizure, good faith exception did not apply to officer's rote application of such practice).

Arizona has codified the exclusionary rule under A.R.S. § 13-3925, as follows. Any evidence seized pursuant to a search warrant may not be suppressed as a result of a violation of Chapter 38 (Search Warrants), except as required by the United States

Constitution and the Arizona Constitution. A.R.S. § 13-3925(A). Where the defendant seeks to exclude evidence from the trier of fact because of the conduct of a peace officer in obtaining the evidence, the State may urge that the peace officer's conduct was taken in a reasonable, good faith belief that the conduct was proper and that the evidence discovered should not be kept from the trier of fact if otherwise admissible. A.R.S. § 13-3925(B). The trial court may not suppress evidence that is otherwise admissible in a criminal proceeding if the court determines that the evidence was seized by a peace officer as a result of a good faith mistake or technical violation. A.R.S. § 13-3925(C). However, this section does not apply to unlawful electronic eavesdropping or wiretapping. A.R.S. § 13-3925(E).

Under A.R.S. § 13-3925(F)(1), “good faith mistake” means a reasonable judgmental error concerning the existence of facts that if true would be sufficient to constitute probable cause. Under A.R.S. § 13-3925(F)(2), “technical violation” means a reasonable good faith reliance on: (a) a statute that is subsequently ruled unconstitutional; (b) a warrant that is later invalidated due to a good faith mistake; and (c) a controlling court precedent that is later overruled, unless the court overruling the precedent orders the new precedent to be applied retroactively.

In Arizona, the good faith exception to the exclusionary rule applies in the context of an arrest warrant as well as in the search warrant context. *State v. Hyde*, 186 Ariz. 252, 273 (1996). It is the prosecution's burden to prove that the good faith exception to the exclusionary rule applies under either federal or state law. *State v. Crowley*, 202 Ariz. 80, 91, ¶ 32 (App. 2002); *see also Brown v. McClennen*, 239 Ariz. 521, 525, ¶ 16, 3 (2016)(State waived good faith exception by failing to raise it). But the appellate court

is required to affirm a trial court's ruling if legally correct for any reason and, in doing so, may address the State's arguments on appeal to uphold the court's ruling even if those arguments otherwise could be deemed waived by the State's failure to argue them below. *State v. Weakland*, 2017 WL 5712585, ¶¶ 8, 9 (App. Nov. 28, 2017), quoting *State v. Boteo–Flores*, 230 Ariz. 551, ¶ 7 (App. 2012).

However, the unrelated use of illegally obtained evidence serves an additional deterrent purpose only when there is a cognitive nexus between the officers' unlawful conduct and the subsequent police investigation or trial. This nexus is established if the charged conduct was in the offending officers' zone of primary interest at the time of the unlawful search or seizure. Deterrent effect is not established by *any* logical connection between the unlawful search or seizure and the subsequent crime charged; rather, there must be an appreciable cognitive nexus from the standpoint of the offending officers. This is because it is the offending officers' conduct the exclusionary rule seeks to deter. *State v. Booker*, 212 Ariz. 502, 505–06, ¶¶ 17-19 (App. 2006)(illegal search and seizure of bong did not have sufficient nexus to subsequent prosecution for aggravated assault and thus exclusionary rule did not bar admission of evidence related to bong to establish defendant's retaliatory motive to harm victim; the use of the bong to support an aggravated assault charge was not within the offending officers' zone of primary interest when they seized it).

**1. Reliance on Warrants**

Because the Fourth Amendment generally requires a warrant, the exclusionary rule usually prohibits the introduction of evidence obtained without one. But the courts have developed an exception to that general rule when the police act in objective good

faith reliance on a facially valid search warrant that is issued by a neutral magistrate but later is held to be invalid. *United States v. Leon*, 468 U.S. 897, 916 (1984). The exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." *Id*. at 917. Thus, "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id*. at 922. However, evidence seized pursuant to a defective warrant may still be suppressed in four situations: (1) when the magistrate has been misled by information “that the affiant knew was false or would have known was false” but recklessly disregarded the truth; (2) when the issuing magistrate has “wholly abandoned” his or her judicial role; (3) when a warrant is based on an affidavit that lacks any indicia of probable cause, thus rendering official belief in its existence entirely unreasonable; and (4) when a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid. *Id.* at 923.

In order for the good faith exception to apply to evidence seized pursuant to an invalid warrant, the police conduct must have been objectively reasonable. *State v. Crowley*, 202 Ariz. 80, 92, ¶ 35 (App. 2002)(officers' reliance on residential search warrant that was based solely on defendant's acceptance of a package containing hashish was not objectively reasonable and thus did not permit application of good-faith exception to exclusionary rule where officers had nothing other than contraband-filled package to establish probable cause that defendant would be committing a crime once he accepted it). *See also State v. Williams*, 184 Ariz. 405, 408 (App. 1995)(good faith exception inapplicable because officers could not reasonably have relied on warrant

that failed to describe with particularity place to be searched or items to be seized and officer must have known that information provided by informant required personal observation).

*Leon* articulated four circumstances under which officers could make no claim that they exercised objective good faith, and there is a three-factor test to determine whether under *Leon*, a warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid: (1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued. *State v. Dean*, 241 Ariz. 387, ¶¶ 6-7, 27 (App. 2017), citing *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986). Because of the privacy interests at stake in computers and the large amount of personal information available therein, a warrant that does not specify that officers intend to search a computer is not sufficiently particular to authorize such a search. *Dean*, ¶ 16.

A search warrant which does not particularly describe either the place to be searched or the items to be seized is not facially valid, and the police cannot rely on it in good faith. As an irreducible minimum, a proper warrant must allow the executing officers to distinguish between items that may and may not be seized. Case law has cautioned officers that warrants authorizing computer searches must be afforded careful scrutiny regarding particularity. *State v. Dean*, 241 Ariz. 387, ¶ 20 (App. 2017), citing *Riley v. California*, – U.S. –, 134 S.Ct. 2473, 2488-89, (2014)(noting privacy interests in

cell phones); *State v. Peoples*, 240 Ariz. 245, ¶ 15 (2016)(cell phones are intrinsically private). The standard is one of objective good faith. Thus, the good-faith exception does not apply if the officer knew or should have known his actions were unconstitutional. *Dean*, ¶ 26. Neither an officer's apparent inexperience nor lack of deliberate misconduct relieves him of the duty to exercise objective good faith in executing a warrant. The exclusionary rule's primary purpose is to deter law enforcement from carrying out unconstitutional searches and seizures; it does not serve this purpose to allow the state to inadequately train its officers and then rely on that inadequate training in defending inadequate warrants. *Dean*, ¶ 28.

Therefore, (1) a warrant that allows an officer to search all of a defendant's electronic materials without specifying what the officer is looking for may not be relied on in good faith, and (2), a warrant that seeks to search a computer must specifically state that a computer is among the items to be seized, and if it does not, it may not be relied on in good faith. "These two principles are well established by Arizona case law and should be known by any trained officer." *State v. Dean*, 241 Ariz. 387, ¶ 31 (App. 2017).

**2. Reliance on Statutes / Case Law**

The Fourth Amendment does not require the exclusion of evidence obtained by police in objectively reasonable reliance on a statute that is later found to be invalid. *Illinois v. Krull*, 480 U.S. 340, 348 (1987). Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth

Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. Penalizing the officer for the legislature's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. *Id.* at 349-50. *See also State v. Valenzuela (Valenzuela II)*, 239 Ariz. 299 (2016)(good-faith exception to exclusionary rule applied to allow admission of results of BAC tests after State failed to prove that DUI defendant's consent, which was given in response to police officer's admonishment that implied consent law required defendant to submit to test, was voluntary; at time of incident, binding precedent sanctioned use of the admonition); *State v. Weakland*, 2017 WL 5712585, ¶ 24 (App. Nov. 28, 2017) (clarifying that it was not until *Valenzuela II* was decided that law enforcement had a clear directive that they could not continue to use the admonition to imply they had authority to compel a warrantless blood draw; therefore, the good faith exception may apply in admin per se cases occurring before *Valenzuela II* was decided). *But see State v. Havatone*, 241 Ariz. 506 (2017)("unconscious clause" of implied consent statute can be constitutionally applied only when case-specific exigent circumstances prevent law enforcement officers from obtaining a warrant; good faith exception did not apply because officer should have known that routinely directing blood draws without making a case-specific determination whether a warrant could be timely secured was either impermissible or at least constitutionally suspect).

To determine whether the good-faith exception applies, the case law relied upon must be binding in the jurisdiction where the police conduct occurred. When police conduct a search based on a non-binding judicial decision, they are guessing at what the law might be, rather than relying on what a binding legal authority tells them it is.

*State v. Mitchell,* 234 Ariz. 410, ¶¶ 28-29 (App. 2014). The court reviews the applicable precedent at the time of the police conduct. *State v. Reyes*, 238 Ariz. 575, 577, ¶ 12 (App. 2015). Binding precedent is Arizona or Supreme Court authority that explicitly authorized the conduct in question. If the law is, at the very least, unsettled, then application of the exclusionary rule would provide meaningful deterrence because it incentivizes law enforcement to err on the side of constitutional behavior. *State v. Mitchell,* 234 Ariz. 410, ¶ 31 (App.2014). In other words, although law enforcement agencies are not expected to anticipate new developments in the law, they should be aware of reasonable interpretations of existing case law. *Id.*

*Compare: State v. Reyes*, 238 Ariz. 575, 578, ¶ 16 (App. 2015)(it was reasonable for officer to rely on the evanescent nature of alcohol in blood of DUI suspect in requesting blood sample without warrant; when defendant's blood was drawn, dissipation of alcohol in blood was in itself a sufficient exigent circumstance); *State v. Kjolsrud*, 239 Ariz. 319, 326, ¶¶ 24-25 (App. 2016)(good faith exception did not apply where case law abrogated but did not overrule prior court precedent or announce a new legal standard, but rather applied a general rule announced previously).

**3. Reliance on Mistake; Negligence / Systemic Error**

The exclusionary rule does not require the suppression of evidence seized in violation of the Fourth Amendment when the erroneous information resulted from clerical errors by court employees. *Arizona v. Evans*, 514 U.S. 1, 14-16 (1995)(officer's reasonable belief in outstanding arrest warrant based on clerical error of court employees). There is no basis for believing that application of the exclusionary rule in such circumstances will have a significant effect on court employees responsible for

informing the police that a warrant has been quashed. Thus, where there is no indication the arresting officer was not acting objectively reasonably when he relied on the police computer record, application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees. *Id*.

Further, the exclusionary rule does not apply when police mistakes that lead to unlawful searches are merely the result of isolated negligence and not systematic error or reckless disregard of constitutional requirements. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. The exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systematic negligence; an instance of isolated negligent does rise to that level. *Herring v. United States*, 555 U.S. 135, 144 (2009)(officer's reasonable belief there was an outstanding arrest warrant for the defendant based on negligent bookkeeping error by police employee).

However, when the Fourth Amendment violation occurs not as the result of an officer's fact-specific determination that obtaining a warrant is infeasible but rather pursuant to department practice making such determination unnecessary, the court will impute to the law enforcement agency the responsibility to assure that unlawful seizures will not occur. *State v. Havatone*, 241 Ariz. 506, ¶ 22 (2017). *See also State v. Mitchell*, 234 Ariz. 410, 419 ¶ 31, 323 P.3d 69, 78 (App. 2014)(good-faith exception provides meaningful deterrence because it incentivizes law enforcement to err on the side of constitutional behavior).

When the law is unsettled, exclusion of evidence obtained in a questionable search or seizure may deter Fourth Amendment violations; if the exclusionary rule is not applied in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would not be excluded. *State v. Havatone*, 241 Ariz. 506, ¶ 29 (2017). Therefore, where an officer's rote application of department policy to obtain warrantless, nonconsensual blood draws was inconsistent with federal and state appellate precedents, and DPS's practice of directing such routine, warrantless, nonconsensual blood draws was not objectively reasonable under Arizona law at the time of the draw, the evidence must be suppressed. *Id*., ¶¶ 33-34. *See also State v. Stoll*, 239 Ariz. 292, ¶ 20 (App. 2016)(officer's reliance on inadequate training did not make conduct objectively reasonable).

**B. Inevitable Discovery / Independent Source**

If the prosecution can establish by a preponderance of the evidence that the illegally seized items or information would have inevitably been seized by lawful means, the United States Supreme Court has held that the deterrence rationale of the exclusionary rule has so little basis that the evidence should be received. Arizona courts recognize the inevitable discovery doctrine in Arizona, but will allow its use only in appropriate circumstances. *State v. Ault*, 150 Ariz. 459, 465 (1986), *citing Nix v. Williams,* 467 U.S. 431, 443 (1984). In *Ault*, the Arizona Supreme Court held the inevitable discovery doctrine would not be allowed to reach into a defendant's home to

justify the admission of evidence produced by an illegal search of a home – even if the evidence would inevitably have been discovered pursuant to a search warrant which was later lawfully obtained. The Court based its decision on Ariz. Const. art. 2 § 8 – regardless of the position the United States Supreme Court – because Arizona constitutional provisions are specific in preserving the sanctity of homes and in creating a right of privacy. "We strongly adhere to the policy that unlawful entry into homes and seizure of evidence cannot be tolerated." *Id*. at 466.

Compare: *State v. Jones*, 185 Ariz. 471, 481 (1996)(inevitable discovery doctrine applied where detectives from another city searched defendant's belongings in the trunk of a local police car where, after detectives finished their search, local police transported defendant's belongings to station and conducted a lawful inventory search; local police inevitably would have found clothing pursuant to inventory search regardless of whether the other detectives had identified clothing); *State v. Snyder*, 240 Ariz. 551, 558-59, ¶¶ 26-31 (App. 2016)(warrantless search of backpack after arrest for shoplifting was not justified under the inevitable discovery doctrine; it was in police officer's discretion whether to take defendant to jail or release him after arresting him for a misdemeanor, officer had no reason to believe that the backpack contained an immediately dangerous instrumentality, and since defendant was taken to the hospital by an ambulance after his arrest it was not inevitable that the backpack would have been searched incident to jail booking or transport in a police vehicle).

Arizona has adopted the broad view of the inevitable discovery rule; under that view, the State is not required to demonstrate that police initiated lawful means to acquire evidence prior to its seizure. But this is so only where it may be assumed that

the police would have complied with subsequent constitutional requirements after an initial illegality. The State cannot claim inevitable discovery and thereupon be excused from all constitutional requirements; such a claim amounts to the unacceptable assertion that police would have done it right had they not done it wrong. *State v. Davolt*, 207 Ariz. 191, 204, ¶ 37 (2004)(inevitable discovery doctrine did not cure multiple constitutional violations leading to search of motel room, even though room would have been discovered without the violations, where there was no basis to assume police would have conducted lawful means of investigation, such as obtaining a search warrant). Thus, the inevitable discovery exception does not turn on whether the evidence would have been discovered had the police acted lawfully in the first place; rather, the exception applies if the evidence would have been lawfully discovered despite the unlawful behavior and independent of it. *Brown v. McClennen*, 239 Ariz. 521, 524-25, ¶ 14 (2016)(police would not have inevitably obtained blood sample by lawful, independent means, but could only have done so by means of a search warrant; since inevitable discovery exception cannot excuse the failure to secure a warrant in the first place, the exclusionary rule applies).

While Arizona law holds that evidence obtained in violation of a constitutional right should be excluded to deter unlawful police conduct, it serves no purpose to put the government in a worse position than it would have been in had no police misconduct occurred. “Inevitability” is measured by a “preponderance of the evidence,” or “more likely than not” standard, not by a “clear and convincing” standard that the word “inevitable” might intuitively suggest. *State v. Rojers*, 216 Ariz. 555, 559, ¶ 19 (App. 2007)(evidence was sufficient to establish that drugs and paraphernalia found in

defendant's car following his arrest would have been discovered as a result of police department's standard procedures for an inventory search and were thus admissible under the inevitable discovery doctrine; under the department's standardized procedures, the bag sitting in plain view on the seat would inevitably have been opened, and the ledgers and scale would inevitably have been discovered).

Another exception to the application of the exclusionary rule is when the evidence is obtained from an independent source. *State v. DeCamp*, 197 Ariz. 36, 38-39, ¶ 10 (App. 1999)(plain view doctrine supported police officer's search of defendant's room for drugs after he plainly viewed bong in room while lawfully in kitchen, even if protective sweep of room was illegal and officer did not inadvertently discover bong). The warrant exceptions of inevitable discovery and independent source relate because they serve to purge the taint of impermissible law-enforcement activity, causally disconnecting the acquisition of the evidence from the illegality. However, each is independent in its applicability. *State v. Soto*, 195 Ariz. 429, 431-32, ¶¶ 11, 13-14 (1999)(marijuana seized by police officers from unlocked shed behind defendant's home as a result of illegal warrantless entry was admissible, where search warrant issued after the entry was not tainted by any information learned during the illegal entry but was based on untainted information provided by an independent confidential informant).

**C. Attenuation**

In determining whether the taint of illegal conduct is sufficiently attenuated from a subsequent search to avoid the exclusionary rule, a court must consider (1), the time elapsed between the illegality and the acquisition of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

*Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). Although *Brown* involved a confession following an illegal search, Arizona courts have applied the attenuation doctrine to other situations. *State v. Hummons*, 227 Ariz. 78, 80-81, ¶ 9 (2011), citing: *State v. Guillen*, 223 Ariz. 314, 317 ¶ 14 (2010)(applying attenuation doctrine to consent search following illegal search); *State v. Blackmore*, 186 Ariz. 630, 634-35 (1996)(upholding search following illegal arrest); *State v. Miller*, 186 Ariz. 314, 320-21 (1996)(upholding admission of statements made after illegal arrest).

The first *Brown* factor, the time elapsed between the illegality and the acquisition of evidence, is the least important. *State v. Hummons*, 227 Ariz. 78, 81, ¶ 10 (2011). On the second factor, the discovery of a valid arrest warrant is an intervening circumstance because it provides a legal basis for the arrest notwithstanding an illegal seizure. But this should not be over-emphasized; if a warrant automatically dissipated the taint of illegality, police could then create a new form of investigation by routinely illegally seizing individuals, knowing that the subsequent discovery of a warrant would provide after-the-fact justification for illegal conduct. *Id*., ¶¶ 11-13.

But the third factor, the purpose and flagrancy of illegal conduct, goes to the very heart and purpose of the exclusionary rule. Courts must consider the totality of circumstances in determining whether the evidence should be suppressed. Factors such as an officer's regular practices and routines, an officer's reason for initiating the encounter, the clarity of the law forbidding the illegal conduct, and the objective appearance of consent may all be important in this inquiry. By focusing on officer conduct, courts may distinguish between ordinary encounters that happen to devolve into illegal seizures and intentionally illegal seizures for the purpose of discovering

warrants. *State v. Hummons*, 227 Ariz. 78, 81-82, ¶ 14 (2011), citing *State v. Guillen*, 223 Ariz. 314, 318-19, ¶¶ 19–21(2010).

**D. Grand Juries**

The exclusionary rule applies only in criminal trials, not grand jury proceedings**.** Given the grand jury's broad inquisitorial powers, the deterrent purpose of the exclusionary rule would not be served by allowing a grand jury witness to refuse to answer questions on the grounds that the questions may have been based on illegally-acquired evidence. *United States v. Calandra*, 414 U.S. 338, 351-52 (1974). The Court declined to embrace a view that would achieve a "speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury." *Id*.